Tentative Rulings for October 24, 2018
Departments 403, 501, 502, 503

There are no tentative rulings for the following cases. The hearing will go forward on these matters. If a person is under a court order to appear, he/she must do so. Otherwise, parties should appear unless they have notified the court that they will submit the matter without an appearance. (See California Rules of Court, rule 3.1304(c).)

14CECG00601 ***Wells Fargo v. Ford*** **(Dept. 503)**

18CECG00390 ***Varo-Real Investments, Inc. v. Daniels, et al.*** **(Dept. 403)**

The court has continued the following cases. The deadlines for opposition and reply papers will remain the same as for the original hearing date.

15CECG01171 ***Brown v. Bank of America, et al.*** **is continued to Thursday, November 1, 2018 at 3:30 p.m. in Department 503.**

17CECG01884 ***Redwood Fire and Casualty Insurance Co. v. Market Express Transportation Co.*** **is continued to Wednesday, October 31, 2018 at 3:30 p.m. in Department 403.**

17CECG01971 ***Doe v. Peña*** **is continued to Wednesday, October 31, 2018 at 3:30 p.m. in Department 503.**

18CECG00629 ***Lopez v. Archie, et al.*** **is continued to Thursday, October 25, 2018 at 3:30 p.m. in Department 503.**

18CECG02957 ***Pinedale County Water District v. City of Fresno*** **is continued to Wednesday, December 5, 2018 at 3:30 p.m. in Department 502.**

(Tentative Rulings begin at the next page)

Tentative Rulings for Department 403

(19)

Tentative Ruling

Re: ***Vela-Cruz v. AG Transports, Inc.***
Court Case No. 17CECG00063 c/w 17CECG03026

Hearing Date: October 24, 2018 (Department 403)

Motion: by plaintiffs for class certification and preliminary approval of settlement

Tentative Ruling:

To deny without prejudice. To order that the parties submit a stipulation and proposed order for the amended consolidated class action complaint, along a separately bound pleading, should they wish to have same filed.

Explanation:

1. CLASS CERTIFICATION

a. Standards

An agreement of the parties is not sufficient to establish a class for settlement purposes. There must be an independent assessment by a neutral court of evidence showing that a class action is proper. *Luckey v. Superior Court* (2014) 228 Cal. App. 4th 81 (*rev. denied*). See also Newberg, Newberg on Class Actions (T.R. Westlaw, 2017) Section 7:3: "The parties' representation of an uncontested motion for class certification does not relieve the Court of the duty of determining whether certification is appropriate."

The case so requiring is *Amchem Prods., Inc. v. Windsor* (1997) 521 U.S. 591, 620 ("*Amchem*"): "Confronted with a request for settlement-only class certification, a district court need not inquire whether the case, if tried, would present intractable management problems [citation omitted] for the proposal is that there will be no trial. But other specifications of the rule--those designed to protect absentees by blocking unwarranted or overbroad class definitions--demand undiluted, even heightened, attention in the settlement context."

> "Class certification requires proof (1) of a sufficiently numerous, ascertainable class, (2) of a well-defined community of interest, and (3) that certification will provide substantial benefits to litigants and the courts, i.e., that proceeding as a class is superior to other methods. In turn, the community of interest requirement embodies three factors: (1) predominant common questions of law or fact; (2) class representatives with claims or defenses typical of the class; and (3) class representatives who can adequately represent the class."
>
> *In re Tobacco II Cases* (2009) 46 Cal. 4th 298, 313.

Plaintiff bears the burden of establishing the propriety of class treatment with admissible evidence. *Richmond v. Dart Industries, Inc*. (1981) 29 Cal. 3d 462, 470; *Lockhead Martin Corp. v. Superior Court* (2003) 29 Cal. 4th 1096, 1106; *Soderstedt v. CBIZ Southern California, LLC* (2011) 197 Cal. App. 4th 133, 144.

ii. Numerosity and Ascertainability

The law specifically demands that a client verify the facts, via discovery or otherwise, as related by counsel, and provides that there is no justifiable reliance on an attorney's statement of facts. See, e.g., *Home Ins. Co. v. Zurich Ins. Co*. (2002) 96 Cal. App. 4th 17, 26. Lawyers cannot testify for their clients or authenticate purported documents of the client. Brown & Weil, Civil Procedure Before Trial (TRG, 2008), § 10:115 - 10:116; *Norcal Mutual Ins. Co. v. Newton* (2000) 84 Cal. App. 4th 64, 72, fnt. 6; *Cullincini v. Deming* (1975) 53 Cal. App. 3d 908, 914; *Maltby v. Shook* (1955) 131 Cal. App. 2d 349, 351-352. *Rodriguez v. County of LA* (1985) 171 Cal. App. 3d 171, 175. The exception is where the attorney has actual personal knowledge. Plaintiff's counsel here provides no basis for claiming personal knowledge of the number of persons in the class.

There is no admissible evidence of the number of persons in the class. Only defendant would know this information. There are no discovery admissions, nor is there any declaration in support of the motion made by a knowledgeable person working for defendants about the number of people meeting the class definition. Given the amount of discovery and documents discussed by counsel and one of the plaintiffs, the absence of admissible evidence is a concern. Evidence Code section 412 states: "If weaker and less satisfactory evidence is offered when it was within the power of the party to produce stronger and more satisfactory evidence, the evidence offered should be viewed with distrust."

Ascertainability is also a problem. While it seems likely that defendant can determine who worked as non-exempt truck drivers during the class period, there is no actual evidence from defendant on this point. If defendant has lost records or did not keep them in a fashion that allows it to extract such information, ascertainability might be impossible for certain members. Evidence is required, and evidence continues to be absent.

c. Community of Interest

i. Class Representatives with Typical Claims

"The focus of the typicality requirement entails inquiry as to whether the plaintiff's individual circumstances are markedly different or whether the legal theory upon which the claims are based differ from that upon which the claims of the other class members will be based." *Classen v. Weller* (1983) 145 Cal. App. 3d 27, 46.

The class representatives have provided declarations this time. Each of them sets forth facts from which their individual possession of claims is shown, but for the wage statement claim. Mr. Velasquez does not provide any of his wage statements, and Mr. Vela-Cruz only provides a single one.

Mr. Vela-Cruz does not state all of his wage statements were in the same format, and Mr. Velasquez does not make any representations as to format used either. But Mr. Vela-Cruz does show that he has at least one wage statement, which establishes he possesses the claim asserted on behalf of the class on this issue.

The question remaining unanswered is whether others in the class have the claims that the named plaintiffs possess.

ii. Predominant Questions of Fact and Law

"As a general rule, if defendant's liability can be determined by facts common to all members of the class, a class will be certified even if the members must individually prove their damages." *Brinker Restaurant Corp. v. Superior Court* (2012) 53 Cal. 4th 1004, 1022.

There is no evidence that the truck drivers suffered similar instances of claimed violations, other than a statement by one class representative that he spoke with unnamed class members who told him they were having the same problems. That is not admissible evidence; it is hearsay and unattributed hearsay at that. Plaintiff's counsel states he talked to many potential class members, but no declarations from any of them are provided.

There remains no admissible evidence of any class-wide policy or practice on the part of the defendants. There are no employee handbooks, memos, or an admissible analysis of defendant's records. Although declarant Creal's C.V. states he has provided analysis and declarations in wage and hour class actions, his supplemental declaration makes clear that he did not provide any such services in this matter. While one of the defendants provides a declaration, it states only that he provided documentation to Creal, but does not touch on any practices or procedures by defendants with regard to the claims made. Expert surveys and analysis of a representative sampling of defendant's records can also show predominant questions of fact and law. See, e.g., *Capitol People First v. DDS* (2007) 155 Cal. App. 4th 676, 692-993:

> "In deciding whether the commonality requirement has been satisfied, courts may consider pattern and practice, statistical and sampling evidence, expert testimony and other indicators of a given defendant's classwide practices in order to assess whether that common behavior toward similarly situated plaintiffs renders class certification appropriate."

In *Sav-On Drug Stores, Inc. v. Superior Court* (2004) 34 Cal. 4th 319, 333, the Court proceeded to cite a plethora of cases wherein proof was made by such evidence rather than the testimony of every individual affected:

> "California courts and others have in a wide variety of contexts considered pattern and practice evidence, statistical evidence, sampling evidence, expert testimony, and other indicators of a defendant's centralized practices in order to evaluate whether common behavior towards similarly situated plaintiffs makes class certification appropriate. Indeed, as the Court of Appeal recently recognized, the use of statistical sampling in an overtime class action does not dispense with proof of damages but rather offers a different method of proof."

In *Pena v. Taylor Farms Pacific, Inc.* (E.D. Cal. 2015) 305 F.R.D. 197, the Court refused to certify a class for failure to provide sufficient evidence of any policy of placing incorrect information on wage statements. The only evidence was a single wage statement from a class representative. The court found that plaintiffs "have not shown the solitary stub makes the same omission as every paycheck delivered to every non-exempt hourly employee, regardless of position or department, over the relevant multi-year time period. They have not even shown all class members received paystubs. Because the plaintiffs bear the burden to show common issues exist and predominate, certification of the wage statement subclass is denied." (*Id.* at 224.)

The lack of evidence of a policy applying to all in the class with regard to the violations claimed means that the predominance element is not established.

d. Adequacy

"[T]he adequacy inquiry should focus on the abilities of the class representative's counsel and the existence of conflicts between the representative and other class members." *Caro v. Procter & Gamble Co.* (1993) 18 Cal. App. 4th 644, 669. Counsel have shown some experience, but the lack of admissible evidence for this motion continues to raise concerns.

2. Settlement

a. Legal Standards

"When, as here, a class settlement is negotiated prior to formal class certification, there is an increased risk that the named plaintiffs and class counsel will breach the fiduciary obligations they owe to the absent class members. As a result, such agreements must withstand an even higher level of scrutiny for evidence of collusion or other conflicts of interest than is ordinarily required under Rule 23(e) before securing the court's approval as fair." *Koby v. ARS National Services, Inc.* (9th Cir. 2017) 846 F. 3d 1071, 1079.

See also *Kullar v. Foot Locker Retail, Inc.* (2008) 168 Cal. App. 4th 116, 129:

> "[I]n the final analysis it is the Court that bears the responsibility to ensure that the recovery represents a reasonable compromise, given the magnitude and apparent merit of the claims being released, discounted by the risks and expenses of attempting to establish and collect on those claims by pursuing litigation. The court has a fiduciary responsibility as

guardians of the rights of the absentee class members when deciding whether to approve a settlement agreement . . . The courts are supposed to be the guardians of the class."

"[T]o protect the interests of absent class members, the court must independently and objectively analyze the evidence and circumstances before it in order to determine whether the settlement is in the best interests of those whose claims will be extinguished . . . [therefore] the factual record must be before the . . . court must be sufficiently developed." (*Id*. at 130.)

What the Court need be leery of is a situation where "there was nothing before the court to establish the sufficiency of class counsel's investigation other than their assurance that they had seen what they needed to see." (*Id.* at 129.)

b. Settlement Here Not Supported.

There remains nothing here other than counsel's assurance he saw what he needed to see. There is no admissible evidence of the number of persons in the class, the number of workweeks, the amount spent on truck washes, the number of days worked total for the class, the number of miles driven, how the salary figures were arrived at, the estimated number of missed meals or rest periods, the amount of overtime unpaid, etc. Counsel's assurance that he looked at a lot of documents personally is not sufficient evidence on which the Court can approve compromise of the claims of all persons in the class.

Mr. Flores testified that the documents given to the CPA were true and correct copies of the records maintained by defendant and its bank, but not that the information therein was true and correct to his own knowledge. A statement by the defendant and a CPA that it would drive the business into bankruptcy if it had to pay more or had to pay in other than installment payments is not enough. The underlying materials must be provided.

The installment payments are also a concern. One justification for settlement is that it provides swift, sure resolution. Here, however, there are questions about whether defendants will be able to make the payments, and the length of time is longer than this case might take through trial and appeal. Thus this justification for settlement is questionable in this case.

3. Other Issues

a. Fee Split Between Counsel

There are several law firms and several attorneys representing the two named plaintiffs. They jointly seek fees of $90,000, in addition to costs. One firm now states that the fees will be split three ways, and each class representative agrees. But there is no written contract or agreement as to that. California Rules of Court, Rule 3.769(b) requires disclosure of any fee agreement, including fee-splitting agreements, where approval of a class action settlement is sought.

See also *Marks v. Spencer* (2008) 166 Cal. App. 4th 219. The class is also entitled to know the fee split agreement and to make an objection to if they choose. The Court noted that such disclosure was even more necessary in the matter before it, where the "situation involved the attorneys' representation of absent class members in settlement negotiations, which creates an increased potential for a conflict of interest." (*Id*. at 227.)

All documents constituting the fee-splitting agreement need to be provided.

b. Settlement Agreement as Evidence

The parties attempt to restrict how the settlement might and might not be used as evidence "in this or any other proceeding." (See paragraph 3 on page 8, last six lines.) The amendment to the settlement agreement states that it "shall not" be offered in a subsequent proceeding in any other court (see amendment, page 4, lines 7-9). The parties cannot make such a determination, and the Court is not permitted to enter such an agreement as part of a judgment, for it conflicts with

It is not for parties to a lawsuit, or even a Court, to attempt to create privileges in addition to those already found in statute. "Courts may not create nonstatutory privileges as a matter of judicial policy." *Schnabel v. Superior Court* (1993) 5 Cal. 4th 704, 720, nt. 4. "It is clear that the privileges contained in the Evidence Code are exclusive and the courts are not free to create new privileges as a matter of judicial policy." *Valley Bank v. Superior Court* (1975) 15 Cal. 3d 652, 656.

Language purporting to set admissibility rules, however phrased, need be omitted.

c. Objections

The amendment to the settlement agreement calls for service of objections on the Settlement Administrator. That is not appropriate; same must be filed with the Court directly, not via the Settlement Administrator. Also, the Court retains its discretion to consider late filed objections; the parties may not stipulate to remove that discretion. The language to the contrary on page 10, paragraph 5, of the settlement need be removed. That is also true for such language in paragraph D.2. of the Notice to Class.

d. Amended Complaint

There need be a stipulation and proposed order submitted with a separately bound proposed Consolidated Class Action Complaint. The Complaint will be deemed filed when the order is signed and the lodged pleading is filed.

e. Release of Claims

In both the Notice and the settlement, the release need be limited to claims which are or could be asserted based on "identical factual predicate" set forth in the amended pleading. The "known and unknown" language need also be removed.

Pursuant to Code of Civil Procedure section 1019.5, subdivision (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: RTM on 10/22/18
(Judge's initials) (Date)

(29)

Tentative Ruling

Re: ***Krueger v. CSAA Insurance Services, Inc., et al.***
Superior Court Case No. 16CECG03394

Hearing Date: October 24, 2018 (Dept. 403)

Motion: Reconsider

Tentative Ruling:

To deny Plaintiff's motion for reconsideration. (Code Civ. Proc. §1008(a).)

Explanation:

When an application for an order has been made to a judge or court, and refused in whole or in part, "any party affected by the order may, within 10 days after service upon the party of written notice of entry of the order and based upon *new or different facts, circumstances, or law,* make application to the same judge or court that made the order, to reconsider the matter and modify, amend, or revoke the prior order. The party making the application shall state by affidavit what application was made before, when and to what judge, what order or decisions were made, and what new or different facts, circumstances, or law are claimed to be shown." (Code Civ. Proc. §1008(a), emphasis added; see *Even Zohar Construction & Remodeling, Inc. v. Bellaire Townhouses, LLC* (2015) 61 Cal.4th 830, 840 [§1008 prohibits a party from making renewed motions not based on new facts or law].) A party seeking reconsideration must provide a satisfactory explanation as to why he or she failed to produce the evidence at an earlier time. (*New York Times Co. v. Superior Court* (2005) 135 Cal.App.4th 206, 212.) Merely asking a court to "grant relief that is inconsistent with a prior order … is not a motion for reconsideration." (*Sorenson v. Superior Court* (2013) 219 Cal.App.4th 409, 421, fn. 13.)

In the case at bench, Plaintiff asks this Court to reconsider its August 23, 2018, order granting Defendant's motion for summary judgment, and denying Plaintiff's motion for summary judgment. Plaintiff's burden on the instant motion is to present new or different facts, circumstances or law.

Plaintiff brings the instant motion pursuant to Code of Civil Procedure sections 473(b) and 438(c). Section 473(b) allows a party to seek relief from a judgment, dismissal, order, or other proceeding taken against that party through his or her mistake, inadvertence, surprise, or excusable neglect. This code section is inapplicable to the instant motion. Similarly, section 438(c) applies to motions for judgment on the pleadings, also inapplicable to the motion at bench.

Plaintiff expresses concern that the Court did not review all of Plaintiff's papers, and therefore based its ruling on an incomplete reading of Plaintiff's submissions. The Court thoroughly reviewed all of Plaintiff's moving papers and supporting documentation, as well as Plaintiff's objection to Defendant's motion. Again, a party's

burden on a motion for reconsideration is to present new or different facts, circumstances, or law. As Plaintiff does not present any new or different facts, circumstances, or law, the motion is denied.

Pursuant to California Rules of Court, rule 3.1312, subdivision (a), and Code of Civil Procedure section 1019.5, subdivision (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: RTM on 10/18/18
(Judge's initials) (Date)

Tentative Rulings for Department 501

(2)

Tentative Ruling

Re: ***Cano et al. v. Kiwi Transport, Inc. et al.***
Superior Court Number: 17CECG03259

Hearing Date: None.

Motion: Petition to Compromise Minor's Claim

Tentative Ruling:

To grant. Petitioner to submit orders that reflect the information in the petitions regarding the disposition of the settlement proceeds. The petitions clearly provide that the disposition of the settlement proceeds will be to invest in an annuity for each minor. It is this disposition that is being approved. The proposed orders presented indicate the settlement proceeds will be deposited into blocked accounts. This disposition is not approved. Petitioner to submit corrected orders for signature within 10 days.

Pursuant to California Rules of Court, Rule 3.1312, subd. (a) and Code of Civil Procedure section 1019.5, subd. (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: JYH on 10/22/18
(Judge's initials) (Date)

(03)

Tentative Ruling

Re: ***Juarez v. Duron***
Case No. 18CECG01275

Hearing Date: ***None necessary. See below***

Motion: Plaintiff's Application for Prove-Up Default Judgment and Order

Tentative Ruling:

To grant plaintiff's application for interlocutory default judgment and order for partition by sale of the subject property. (Code Civ. Proc. § 872.010, *et seq*.)

Explanation:

"A partition action may be commenced and maintained by any of the following persons: (1) A coowner of personal property." (Code Civ. Proc., § 872.210, subd. (a)(1).)

"The plaintiff shall join as defendants in the action all persons having or claiming interests of record or actually known to the plaintiff or reasonably apparent from an inspection of the property, in the estate as to which partition is sought." (Code Civ. Proc., § 872.510.)

"The interests of the parties, plaintiff as well as defendant, may be put in issue, tried, and determined in the action." (Code Civ. Proc., § 872.610.) "To the extent necessary to grant the relief sought or other appropriate relief, the court shall determine the status and priority of all liens upon the property." (Code Civ. Proc., § 872.630, subd. (a).) Also, "[t]he court may appoint a referee to ascertain the facts necessary for the determination required by this section." (Code Civ. Proc., § 872.630, subd. (b).)

"At the trial, the court shall determine whether the plaintiff has the right to partition." (Code Civ. Proc., § 872.710, subd. (a).) "If the court finds that the plaintiff is entitled to partition, it shall make an interlocutory judgment that determines the interests of the parties in the property and orders the partition of the property and, unless it is to be later determined, the manner of partition." (Code Civ. Proc., § 872.720, subd. (a).) "The court shall order that the property be divided among the parties in accordance with their interests in the property as determined in the interlocutory judgment." (Code Civ. Proc., § 872.810.)

"Notwithstanding Section 872.810, the court shall order that the property be sold and the proceeds be divided among the parties in accordance with their interests in the property as determined in the interlocutory judgment in the following situations: … The court determines that, under the circumstances, sale and division of the proceeds would be more equitable than division of the property. For the purpose of making the determination, the court may appoint a referee and take into account his report." (Code Civ. Proc., § 872.820, subd. (b).)

"The action for partition may be brought by one or more of the persons described in section 752 of the Code of Civil Procedure [now sections 872.010 *et seq.*]. It is a special proceeding regulated by the provisions of the statute and ordinarily, if the party seeking partition is shown to be a tenant in common, and as such entitled to the possession of the land sought to be partitioned, the right is absolute." (*Bacon v. Wahrhaftig* (1950) 97 Cal.App.2d 599, 603, internal citations omitted.)

Here, plaintiff has described the property at issue in the complaint and named all known persons with an interest in the property, namely plaintiff and defendant, who are co-owners. The plaintiff and defendant own the property as single persons, so there is no need for a family law action to divide community property. Defendant has been served with the summons, complaint, and lis pendens, and he has failed to appear and contest the action. As a result, the court will determine the merits of the claim without his input.

According to plaintiff's evidence, it would be more equitable to partition the property by sale than to partition it in kind, as the property is a single family residence on an R-1 zoned parcel. Also, defendant has been in sole possession of the property since 1995, and has excluded plaintiff from the property. He has also refused to provide an accounting for any rental income from the property, which plaintiff estimates to be $1,400 per month. Defendant has also ignored all of plaintiff's demands to either buy out plaintiff's interest in the property or put the property up for sale. Therefore, it appears that partition by sale is necessary to allow plaintiff to recover her share of the property's value.

As a result, the court intends to grant the requested orders to enter an interlocutory judgment for the property to be put up for sale, and to appoint a referee to manage the listing and sale of the property. Defendant is ordered to cooperate with the referee in selling the house. Once the referee has completed the sale, plaintiff can bring a motion to have a final judgment entered, which can apportion costs of the sale, referee's commission, and attorney's fees, and distribute the remaining funds from the sale to the parties.

Pursuant to CRC 3.1312 and CCP §1019.5(a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: JYH on 10/22/18
(Judge's initials) (Date)

Tentative Rulings for Department 502

(2)

Tentative Ruling

Re: ***In re Daniel Sandoval***
Superior Court Case No. 18CECG03348

Hearing Date: October 24, 2018 (Dept. 502)

Motion: Petition to Compromise Minor's Claim

Tentative Ruling:

To grant the petition compromising the minor's claim. Proposed order is signed. Hearing off calendar.

The request made at item 21 of the petition regarding confidential filing is denied. Petitioner has failed to submit a motion or application for an order sealing the record.

Pursuant to California Rules of Court, rule 3.1312 and Code of Civil Procedure section 1019.5(a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: DSB on 10/22/18
(Judge's initials) (Date)

(30)

Tentative Ruling

Re: ***Mary Johnston v. Regina Artiaga***
Superior Court No. 18CECG00708

Hearing Date: October 24, 2018 (Dept. 502)

Motions: Defendants' demurrer and motion to strike plaintiff's second amended complaint

Tentative Ruling:

To sustain demurrer based upon Code of Civil Procedure section 430.10, subdivision (e): immunity and failure to state a cause of action.

To order motion to strike off calendar.

Plaintiff is granted twenty days leave to amend. All changes must be in bold. The time in which an amendment may be filed will run from service by the clerk of the minute order.

Explanation:

Immunity

Government Code section 820.2 provides that, "[e]xcept as otherwise provided by statute, a public employee is not liable for an injury resulting from his act or omission [that] was the result of the exercise of the discretion vested in him, whether or not such discretion be abused." The only work-related conduct excluded from this broad grant of immunity is enumerated in Government Code section 820.21, *e.g.*, perjury, fabricating evidence, failing to disclose known exculpatory evidence, and obtaining testimony by duress -- and even this conduct is only subject to liability if committed with malice. (Gov't. Code § 820.21.)

Accordingly, courts have long recognized decisions made by a social worker to be immune, as part of or incidental to his or her duties. (*Jacqueline T. v. Alameda Cty. Child Protective Servs.* (2007) 155 Cal.App.4th 456, 466.) In *Jacqueline T*, social workers were held immune for their child removal and placement decisions in dependency proceedings. The court noted that "[s]everal appellate courts . . . have held that a social worker's decisions relating to . . . the investigation of child abuse, removal of a minor, and instigation of dependency proceedings, are discretionary decisions subject to immunity under [Cal. Govt. Code] section 820.2, and/or prosecutorial or quasi-prosecutorial decisions subject to immunity under section 821.6." (*Id.* at p 466; see also *Khai v. Cty. of L.A.* (9th Cir. 2018) 730 Fed.Appx. 408, 410.)

Penal Code section 11172 also provides immunity to social workers for conduct involving or occurring during the collection of data, or the observation, examination, or treatment of the suspected victim or perpetrator of child abuse, performed in a

professional capacity or within the scope of employment. (*Arce v. Childrens Hospital Los Angeles* (2012) 211 Cal.App.4th 1455, 1494.) This immunity applies regardless of whether the alleged conduct is committed with the intent to vex, annoy or harass an innocent party. (*Id.* at p. 1493.)

Here, during all relevant interactions between the parties, plaintiff alleges that defendant Artiaga was a Social Workers and an employee of the County of Fresno, and that she was acting in the course and scope of their employment. Therefore, even if defendant Artiaga arranged for plaintiff to be drug tested, stated that plaintiff was "5150," blamed plaintiff for her grandchildren's behaviors, or inflicted emotional distress upon plaintiff as a result of these actions, she is protected under Government Code sections 820.2, 821.6, and Penal Code section 11172. Defendants Rios and Payvendy are likewise protected in their decision to keep Artiaga assigned to plaintiff's case.

Defamation

"The general rule is that the words constituting an alleged libel must be specifically identified, if not pleaded verbatim, in the complaint." (*Vogel v. Felice* (2005) 127 Cal.App.4th 1006, 1017, fn. 3.) Although an alleged slander may be pleaded with less specificity than libel, the complaint must nonetheless state the substance of the defamatory statement. (*Okun v. Superior Court* (1981) 29 Cal.3d 442, 458.)

Here, in support of a cause of action for defamation, plaintiff alleges only that Artiaga "would continue to lie to keep the case open," and that she "gave false information to continue the case and verbally torture me." However, as stated above, defamation requires that the words constituting an alleged libel be specifically identified, or that the substance of an alleged slander be stated. Plaintiff's allegations are therefore insufficient to meet the pleading standards for either libel or slander.

Intentional infliction of emotional distress

To state a cause of action for intentional infliction of emotional distress, a plaintiff must plead facts sufficient to reasonably conclude: (1) outrageous conduct by the defendant; (2) the defendant's intention of causing or reckless disregard of the probability of causing emotional distress; (3) the plaintiff's suffering severe or extreme emotional distress; and (4) actual and proximate causation of the emotional distress by the defendant's outrageous conduct. (*Gabrielle A. v. County of Orange* (2017) 10 Cal.App.5th 1268, 1289.) A defendant's conduct is "outrageous" when it is so "extreme as to exceed all bounds of that usually tolerated in a civilized community." (*Hughes v. Pair* (2009) 46 Cal.4th 1035, 1050–1051.)

Here, in support of a cause of action for intentional infliction of emotional distress, plaintiff alleges that defendant Artiaga "always cut me down and [embarrasses] me in front of everyone." However, without knowing how specifically defendant Artiaga belittled plaintiff, it is impossible to determine if her conduct was "outrageous." Plaintiff's allegations are therefore insufficient to meet the pleading standards for intentional infliction of emotional distress.

Pursuant to California Rules of Court, rule 3.1312(a), and Code of Civil Procedure section 1019.5, subdivision (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: DSB on 10/22/18
(Judge's initials) (Date)

Tentative Rulings for Department 503

(28) **Tentative Ruling**

Re: ***Duncan v. McCormick, Barstow, Sheppard, Wayte & Carruth, LLP***
Superior Court Case No. 18CECG02381

Hearing Date: October 24, 2018 (Dept. 503)

Motion: By Defendants Demurring to Complaint
By Defendants to Strike Portions of Complaint

Tentative Ruling:

To sustain the demurrer to the first cause of action with leave to amend. To overrule the demurrer to the second cause of action for malicious prosecution on the ground that the facts provide a basis for an abuse of process claim.

To grant the motion to strike in its entirety with leave to amend.

Plaintiff may file an amended complaint within ten (10) court days of service of this order. All new or additional facts must be set forth in **boldface** typeset.

Explanation:

Demurrer

A general demurrer admits the truth of all material allegations and a court will "give the complaint a reasonable interpretation by reading it as a whole and all its parts in their context." (*People ex re. Lungren v. Superior Court* (1996) 14 Cal.4th 294, 300.) A demurrer can be used only to challenge defects that appear on the face of the pleading under attack or from matters outside the pleading that are judicially noticeable. (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.)

Defendants have demurred to the complaint, arguing that the causes of action for negligence and malicious prosecution do not state valid claims.

Negligence

A cause of action for negligence requires the pleader to plead the existence of a legal duty of care, a breach of that duty, and proximate cause resulting in injury. (*Castellon v. US Bankcorp* (2013) 220 Cal.App.4th 994, 998.) As noted by Defendants, Plaintiff has not alleged a legal duty owed by Defendants to Plaintiff in this matter.

However, Defendants have cited to no legal authority that would absolutely foreclose any duty owed by Defendants to Plaintiff. Therefore, leave to amend is granted.

Malicious Prosecution

As set forth by Defendants, a malicious prosecution claim requires a plaintiff to allege that a lawsuit (1) was commenced by or at the direction of the defendant and was pursued to a legal termination favorable to the plaintiff; (2) was brought without probable cause; and (3) was initiated with malice. (*Nunez v. Pennisi* (2015) 241 Cal.App.4th 861, 872-873.) While these elements do appear, at least superficially, to be pleaded in the complaint, Defendants argue that an Order to Show Cause (OSC) cannot be the basis for a malicious prosecution claim. (*Bidna v. Rosen* (1993) 19 Cal.App.4th 27, 37; *Lossing v. Superior Court* (1989) 207 Cal.App.3d 635, 638.)

However, the *Bidna* court refused to extend a malicious prosecution claim into the family law context. (*Bidna*, *supra*, 19 Cal.App.4th at 38-39). Although there is language in the *Bidna* decision that would seem to extend the prohibition to OSC's in general, the language is best construed as reflecting OSC's related to family law cases. Likewise, the *Lossing* court was concerned with the instigation of contempt proceedings pursuant to a discovery dispute not (as apparently here) with respect to the failure to pay a civil judgment. (*Lossing, supra,* 207 Cal.App.3d at 639.) Here, the OSC appears to be an independent action to enforce a civil judgment. As such, the concerns of *Lossing* and *Bidna* are inapplicable.

That said, Defendants are correct in contending that the elements of malicious prosecution require a final determination of the action, and not merely one piece of it. (*Nunez, supra,* 241 Cal.App.4th at 872-73.) Here, the complaint does not allege that there was a final determination of the action. As a result, Plaintiff has not pleaded a valid cause of action for malicious prosecution.

However, it does appear that Plaintiff has alleged a cause of action for abuse of process. In order to allege a cause of action for abuse of process, a plaintiff must plead that the defendant (1) entertained an ulterior motive in using the process; and (2) committed a willful act in a wrongful manner. (*State Farm Automobile Ins. Co. v. Lee* (2011) 193 Cal.App.4th 34, 39-40.) In this case, Plaintiff alleges that Defendants had an ulterior motive in filing for the OSC and did so without probable cause or sufficient evidence. This appears to be adequate for the purposes of pleading the abuse of process claim. If a claim contains facts that support a cause of action, even if mislabeled, the demurrer will be overruled. (*Sheehan v. San Francisco 49ers, Ltd.* (2009) 45 Cal.4th 992, 998.) Therefore, the demurrer is overruled on this ground.

Motion to Strike

Defendants move to strike the prayers for punitive damages and for attorney's fees. A motion to strike can be used to: "(a) [s]trike out any irrelevant, false, or improper matter inserted in any pleading"; or "(b) [s]trike out all or any part of any pleading not drawn or filed in conformity with the laws of this state, a court rule, or an order of the court." (Code Civ. Proc. § 436, subd. (a); see also Code Civ. Proc. § 431.10, subd.(b).) A court will "read allegations of a pleading subject to a motion to strike as a whole, all parts in their context, and assume their truth." (*Clauson v. Sup.Ct. (Pedus Services, Inc.)* (1998) 67 Cal.App.4th 1253, 1255.)

A motion to strike may lie where the facts alleged do not rise to the level of "malice, fraud or oppression" required to support a punitive damages award. (*Turman v. Turning Point of Central Calif.* (2010) 191 Cal.App.4th 53, 63.) Mere conclusory allegations will simply not suffice. (*Brousseau v. Jarrett* (1977) 73 Cal.App.3d 864, 872.)

As noted by Defendants in their moving papers, the allegations in the complaint concerning punitive damages are entirely conclusory and do not contain sufficient grounds to find "malice, fraud or oppression." Therefore, the motion to strike the punitive damages claim is granted with leave to amend.

Defendants also move to strike the claim for attorney's fees. Plaintiff has not identified any source for the claim for attorney fees (such as a contract or a statutory provision) in either the complaint or opposition. Therefore, the motion to strike the claim for attorney's fees is granted with leave to amend.

Pursuant to California Rules of Court, rule 3.1312, subdivision (a), and Code of Civil Procedure section 1019.5, subdivision (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: KAG on 10/22/18
(Judge's initials) (Date)

(28) **Tentative Ruling**

Re: ***Duncan v. McCormick, Barstow, Sheppard, Wayte & Carruth, LLP***
Superior Court Case No. 18CECG02381

Hearing Date: October 24, 2018 (Dept. 503)

Motion: By Defendants to have Plaintiff declared a vexatious litigant and require Plaintiff to post security

Tentative Ruling:

To grant the motion to declare Plaintiff a vexatious litigant. To deny the motion to require Plaintiff to post a security and for entry of a prefiling order.

Explanation:

Defendants seek to have Plaintiff declared a vexatious litigant under two provisions of the applicable statute, Code of Civil Procedure section 391, subdivision (b)(1) and subdivision (b)(3). Code of Civil Procedure section 391, subdivision (b) contains various provisions by which a plaintiff may be deemed vexatious. A plaintiff's litigation conduct must meet one of the definitions—the court may not "mix and match" portions of each definition. (*Holcomb v. U.S. Bank Nat'l Ass'n* (2005) 129 Cal.App.4th 1494, 1501.)

Whether Plaintiff is a vexatious litigant under section 391, subdivision (b)(1)

In the moving papers, Defendants rely first on Code of Civil Procedure section 391, subdivision (b)(1), which defines a vexatious litigant as one who:

> In the immediately preceding seven-year period has commenced, prosecuted, or maintained in propria persona at least five litigations other than in a small claims court that have been (i) finally determined adversely to the person or (ii) unjustifiably permitted to remain pending at least two years without having been brought to trial or hearing.

Here, Defendants note several filings by Plaintiff in the last seven years. In order to be "finally determined," all avenues for direct review must have been exhausted or the time for appeal expired. (*Childs v. PaineWebber, Inc.* (1994) 29 Cal.App.4th 982, 994.) In *Childs*, the court specifically held that a plaintiff could not be adjudged vexatious while earlier lawsuits were still on appeal, impliedly finding that a case and its appeal should be considered one action for purposes of section 391. (*Id.*) Cases voluntarily dismissed without prejudice by a pro se plaintiff do, however, "count" for purposes of the statute, since they still place a burden on the judicial system and the target of the litigation. (*Tokerud v. Capital Bank Sacramento* (1995) 38 Cal.App4th 775, 779.)

Defendants identify six lawsuits, including the present one, which Plaintiff has filed in the last two years. The current lawsuit, however, has not been finally determined adversely against Plaintiff. The "third lawsuit," Madera Superior Court Case No. SCV011044, is a cross-complaint. It is unclear if cross-complaints fall within the definition of section 391, subsection (b)(1). Even if such litigation does, this action is currently in abatement, and there has not been a final determination. The "fourth lawsuit," Madera Superior Court Case No. MCV075999, is also in abatement and so would not "count" for purposes of section 391, subdivision (b)(1). Thus, there are only three filings in the trial courts at issue.

Defendants also refer to various appeals that Plaintiff has filed, citing to *Garcia v. Lacey* (2014) 231 Cal.App.4th 402, 406. Defendants are correct that appeals or writ proceedings may "count" separately for purposes of section 391, subdivision (b)(1). However, *Garcia* did not consider the question squarely, but was concerned with whether certain federal lawsuits had even "commenced" for purposes of the statute. (*Garcia*, *supra*, 231 Cal.App.4th at 412-13.) Plaintiff also cites *Fink v. Shemtov* (2010) 180 Cal.App.4th 1160, for the proposition that two appeals from the same case may count separately for purposes of section 391, subdivision (b)(1). (*Fink*, *supra*, 180 Cal.App.4th at 1173-74.) In *Fink*, the court counted the appeal from the underlying judgment and the appeal from the attorney's fees order as separate "litigations." (*Id.*) The *Fink* court apparently did not consider them as three separate litigations (underlying litigation, first appeal, and second appeal). (*Id.*)

As a result, this court does not consider the appeal in Fifth District Court of Appeal Case No. F075258 separately from the underlying case, Madera Superior Court Case No. MCV07300. However, the two appeals, Fifth District Court of Appeal Case No. F074645 and No. F075258, from the same case, Madera Superior Court Case No. SFL001901, are considered separate "litigations" for purposes of the statute, since each was determined finally and adversely to Plaintiff.

Therefore, Defendants have shown that Plaintiff has commenced five separate litigations in pro per and that each was determined finally and adversely against him. As a result, the court finds him to be a vexatious litigant under section 391, subdivision (b)(1).

Whether Plaintiff is a vexatious litigant under subdivision (b)(3)

Under Code of Civil Procedure section 391, subdivision (b)(3), a litigant may be considered vexatious where "In any litigation while acting in propria persona, [the litigant] repeatedly files unmeritorious motions, pleadings, or other papers, conducts unnecessary discovery, or engages in other tactics that are frivolous or solely intended to cause unnecessary delay." Determining whether the offending conduct is "repeated" or "unmeritorious" is for the sound discretion of the court. (*Morton v. Wagner* (2007) 156 Cal.App.4th 963, 971.) However, most cases have considered whether the motions, etc. are filed in the same litigation, not across various, separate proceedings. (*Id.* at 972; *but see Holcomb, supra,* 129 Cal.App.4th at 1506 (considering litigation behavior in a previous case).)

In this case, there has been no such conduct. The case has not even been placed at issue. Moreover, the evidence cited by Defendants—the complaints and appeals—are more properly the subject of analysis under subdivision (b)(2). (*Holcomb*, *supra*, 129 Cal.App.4th at 1501 (court may not "mix and match" portions of each definition).) Therefore, section 391, subdivision (b)(3) does not support Defendants' contentions.

Whether Plaintiff should be required to post security and motion for a prefiling order

When a plaintiff has been declared a vexatious litigant, a defendant may move the court for an order requiring the plaintiff to post a bond on the ground that the plaintiff is a vexatious litigant and "there is not a reasonable probability that he will prevail in the litigation against the moving defendant." (Code Civ. Proc. §391.1.) If the motion is granted, the case is automatically stayed from the time the motion was filed until 10 days after the plaintiff posts the required security. (Code Civ. Proc. §391.6) If the bond is not posted, the action must be dismissed as to the defendant in whose favor the bond was ordered. (Code Civ. Proc. §391.4)

The court is not bound to assume the truthfulness of the complaint and may weigh evidence presented on a motion to post security. (*Moran v. Murtagh Miller Meyer & Nelson, LLP* (2007) 40 Cal.4th 780, 784.) The defendant has the burden of proving that the plaintiff has no reasonable likelihood of prevailing. (*Golin v. Allenby* (2010) 190 Cal.App.4th 616, 640-41.)

Here, Defendants have based the possibility of prevailing solely on the demurrer to the complaint, currently scheduled concurrently with this motion. This would only be sufficient if the demurrer could be sustained without leave to amend as a matter of law. However, the tentative ruling on the demurrer is to overrule in part, and sustain in part, with leave to amend. Even if the demurrer was sustained in total, leave to amend would likely be granted as to both causes of action. In the final analysis, Defendants simply have not borne their burden to show that Plaintiff has no likelihood of prevailing. Therefore, the motion for a security is denied.

Although the court has discretion to enter a prefiling order at this juncture, pursuant to Code of Civil Procedure section 391.7, the fact that Plaintiff only just falls within the scope of Code of Civil Procedure section 391 counsels against entering such an order in this case. However, the court cautions Plaintiff to be judicious in future filings, as well as in handling this and other matters in which he is involved, so as not to provide sufficient grounds for such an order.

Pursuant to California Rules of Court, rule 3.1312, subdivision (a), and Code of Civil Procedure section 1019.5, subdivision (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: KAG on 10/22/18
(Judge's initials) (Date)

(20) **Tentative Ruling**

Re: ***Lewis v. FCA UA LLC***
Superior Court Case No. 16CECG01922

Hearing Date: October 24, 2018 (Dept. 503)

Motion: Plaintiff's Motion for Attorney Fees and Costs

Tentative Ruling:

To grant the motion for attorney's fees in the amount of $9,550.00; to defer ruling on the recoverable costs until defendant's motion to tax costs. Payment shall be made by defendant FCA UA LLC to the Knight Law Group within 30 days of the clerk's service of this minute order.

Explanation:

A prevailing buyer in an action under the Song-Beverly Act "shall be allowed by the court to recover as part of the judgment a sum equal to the aggregate amount of costs and expenses, including attorney's fees based on actual time expended, determined by the court to have been reasonably incurred by the buyer in connection with the commencement and prosecution of such action." (Civ. Code, § 1794, subd. (d).) The statute "requires the trial court to make an initial determination of the actual time expended; and then to ascertain whether under all the circumstances of the case the amount of actual time expended and the monetary charge being made for the time expended are reasonable. These circumstances may include, but are not limited to, factors such as the complexity of the case and procedural demands, the skill exhibited and the results achieved. If the time expended or the monetary charge being made for the time expended are not reasonable under all the circumstances, then the court must take this into account and award attorney fees in a lesser amount. A prevailing buyer has the burden of 'showing that the fees incurred were "allowable," were "reasonably necessary to the conduct of the litigation," and were "reasonable in amount."'" (*Nightingale v. Hyundai Motor America* (1994) 31 Cal.App.4th 99, 104.)

Calculating the Fees

A court assessing attorney's fees begins with a touchstone or lodestar figure, based on the "careful compilation of the time spent and reasonable hourly compensation of each attorney . . . involved in the presentation of the case." (*Serrano v. Priest* (*Serrano III*) (1977) 20 Cal.3d 25, 48; *Robertson v. Fleetwood Travel Trailers of California, Inc*. (2006) 144 Cal.App.4th 785, 817 [lodestar applies to Song-Beverly litigation].) Here, plaintiff seeks a loadstar of $37,937.50. As the California Supreme Court has repeatedly made clear, the lodestar consists of "the number of hours *reasonably expended* multiplied by the *reasonable* hourly rate. . . ." (*PLCM Group, Inc. v. Drexler* (2000) 22 Cal.4th 1084, 1095 (italics added); *Ketchum v. Moses* (2001) 24 Cal.4th 1122, 1134.) The California Supreme Court has noted that anchoring the calculation of attorney fees to the lodestar adjustment method "'is the only way of

approaching the problem that can claim objectivity, a claim which is obviously vital to the prestige of the bar and the courts.'" (*Serrano III*, *supra*, 20 Cal.3d at p. 48, fn. 23.)

1. Number of Hours Reasonably Expended

Here, plaintiff's attorneys expended 110.1 hours on this action, including the motion for attorney fees. In awarding attorney's fees, the law requires the court to first determine the actual amount of time expended by counsel, and then, second, to determine if that time and fee were reasonable. (*Nightingale v. Hyundai Motor America*, *supra*, 31 Cal.App.4th at p. 104.) Factors affecting reasonableness may include, "the complexity of the case and procedural demands, the skill exhibited and the results achieved." (*Ibid*.)

Here, the results achieved are excellent, amounting to approximately three times the price of the vehicle. The complexity and procedural demands of the case were nominal. The skill exhibited was good. The time spent on each task was reasonable, and each task was reasonably necessary. Defendant criticizes plaintiff's use of 10 attorneys on this case. However, defendant fails to point to any instances in the billing entries of duplicated effort or excessive time on any particular task. The court is aware of none.

Nonetheless, defendant correctly contends that the court should disallow the bulk of the time reflected in the billing statements because there is not competent evidence of the work performed by each attorney. The party moving for a fee award must provide *admissible* evidence of the experience, skill, and reputation of the attorney requesting the fees. (*Heritage Pacific Financial LLC v. Monroy* (2013) 215 Cal.App.4th 972, 1009.) Where a party fails to submit sufficient evidence as to the services provided by its attorneys, or their qualifications or experience to support the requested billing rates, the trial court has discretion to deny a motion for attorney's fees. (*Ajaxo Inc. v. E*Trade Group, Inc*. (2005) 135 Cal.App.4th 21, 65.)

Approximately 10 attorneys from two law firms billed on the case, but plaintiff offers only declarations from two attorneys, one from each firm. There is no admissible evidence of the other attorneys' qualifications, or of the time they billed. Accordingly, the court can award fees only for the work done by attorneys Wirtz and Mikhov.

2. Reasonable Hourly Compensation

Reasonable hourly compensation is the "hourly prevailing rate for private attorneys in the community conducting noncontingent litigation of the same type." (*Ketchum v. Moses*, *supra*, 24 Cal.4th at p. 1133.) Ordinarily, "'the value of an attorney's time . . . is reflected in his normal billing rate.'" (*Mandel v. Lackner* (1979) 92 Cal.App.3d 747, 761.)

The requested rates for plaintiff's counsel are higher than Central California's prevailing rates for comparable consumer litigators. Where a party is seeking out-of-town rates, he or she is required to make a "sufficient showing . . . that hiring local counsel was impractical." (*Nichols v. City of Taft* (2007) 155 Cal.App.4th 1233, 1244.) Plaintiff has made no showing of any attempt to seek local counsel.

This court awarded William Krieg, a consumer and lemon law attorney with over 40 years of experience, fees based on a rate of $425 per hour in *Torres v. Cain Business Enterprises, Inc.*, Fresno Superior Court Case No. 13CECG00345. (See Minute Order dated March 3, 2016.) The court awarded the Knight Law Group, LLP, counsel herein, fees ranging from $400 per hour to $225 per hour in *Tapia v. Hyundai Motor America*, Fresno Superior Court Case No. 15CECG01433. (See Minute Order dated October 6, 2017.) The court awarded fees to the Knight Law Group, LLP ranging from $400 per hour to $250 per hour in *Metzger v. FCA US LLC, et al.*, Fresno Superior Court Case No. 16CECG02922 on August 30, 2018. Accordingly, the court reduces the hourly rates as follows (assuming admissible evidence of the attorneys' experience were presented):

- Wirtz Law APC
    - Richard Wirtz $400
    - Amy Smith $300
    - Jessica Underwood $225
    - Lauren Veggian $200
    - Rebecca Evans $150
    - Erin Barns $300
- Knight Law Group, LLP
    - Steve Mikhov $400
    - Amy Morse $300
    - Kristina Stephenson-Cheang $300
    - Daniel Kalinowski $225
    - Zachary Powell $300

3. Multiplier

Plaintiff seeks a multiplier of 0.5 to apply to the lodestar. That would actually result in a 50% reduction in fees. The court presumes that plaintiff intends to request a 1.5 multiplier.

A multiplier enhancement to the lodestar "is primarily to compensate the attorney for the prevailing party at a rate reflecting the risk of nonpayment in contingency cases as a class." (*Ketchum*, *supra*, 24 Cal.4th at p. 1138.) A multiplier may also be applied where the attorney has shown extraordinary skill, resulting in exceptional results. (*Ibid*.; *Graham v. DaimlerChrysler Corp.* (2004) 34 Cal.4th 553, 582.) Courts have substantial discretion to select the factors they deem relevant to their multiplier analysis. (*Lealao v. Beneficial California, Inc*. (2000) 82 Cal.App.4th 19, 40–41.) The factors include: (1) the novelty and difficulty of the questions involved and the skill displayed in presenting them; (2) the extent to which the nature of the litigation precluded other employment by the attorneys; and (3) the contingent nature of the fee award, based on the uncertainty of prevailing on the merits and of establishing eligibility for the award. (*Robertson v. Fleetwood Travel Trailers of California, Inc*. (2006) 144 Cal.App.4th 785, 819.)

a. Novelty and Complexity of the Issues

In *Blum v. Stenson* (1984) 465 U.S. 886, the United States Supreme Court discussed what might be a basis for an upward adjustment to the lodestar. The Supreme Court

noted that certain suggested bases for an upward adjustment were not warranted because they were already reflected in the lodestar. (*Id*. at p. 898.) Specifically, "[t]he novelty and complexity of the issues presumably were fully reflected in the number of billable hours recorded by counsel and thus do not warrant an upward adjustment in a fee based on the number of billable hours times reasonable hourly rates." (*Ibid.*)

The instant action is a lemon law case of ordinary complexity and no particular novelty. Counsel was appropriately compensated through the time billed.

b. Skill Displayed

In general, "special skill and experience of counsel should be reflected in the reasonableness of the hourly rates." (*Blum*, *supra*, 465 U.S. at p. 889.) As the California Supreme Court observed, "[t]he factor of extraordinary skill, in particular, appears susceptible to improper double counting; . . . a more skillful and experienced attorney will command a higher hourly rate. (*Ketchum*, *supra*, 24 Cal.4th at p. 1138-1139.) "Thus, a trial court should award a multiplier for exceptional representation only when the quality of representation far exceeds the quality of representation that would have been provided by an attorney of comparable skill and experience billing at the hourly rate used in the lodestar calculation. Otherwise, the fee award will result in unfair double counting and be unreasonable." (*Id*. at p. 1139.)

The skill displayed by plaintiff's counsel was very good, but not extraordinary. Counsel's hourly rates are adequate compensation.

c. Contingent Nature of the Case

This is the most important factor in awarding a multiplier. As explained by the California Supreme Court: "[The multiplier] for contingent risk [brings] the financial incentives for attorneys enforcing important constitutional rights . . . into line with incentives they have to undertake claims for which they are paid on a fee-for-services basis." (*Ketchum*, *supra*, 24 Cal.4th at p. 1138.) The Court further noted that applying a fee enhancement does not inevitably result in a windfall to attorneys: "Under our precedents, the unadorned lodestar reflects the general local hourly rate for a fee-bearing case; it does not include any compensation for contingent risk . . . . The adjustment to the lodestar figure, *e.g.*, to provide a fee enhancement reflecting the risk that the attorney will not receive payment if the suit does not succeed, constitutes earned compensation; unlike a windfall, it is neither unexpected nor fortuitous. Rather, it is intended to approximate market-level compensation for such services, which typically includes a premium for the risk of nonpayment or delay in payment of attorney fees." (*Ibid*; see also *Horsford v. Board of Trustees* (2005) 132 Cal.App.4th 359, 399-400.)

This factor weighs in favor of a multiplier.

d. Results Obtained

Plaintiff's counsel obtained an excellent result. This factor weighs in favor of a multiplier.

e. Preclusion of Other Work

There is no evidence that plaintiff's attorneys were unable to take other work because they were working on plaintiff's case.

Considering all of the factors, the court grants a 1.25 multiplier, which compensates counsel for the risk of taking the case on a contingent fee basis, and the excellent results they achieved, but also takes into account the fact that the case was a fairly routine lemon law action that did not greatly hamper counsel's ability to litigate other cases.

This results in a fee of $9,550.00, given that the billings of the majority of the attorneys (a total of $32,219.75) have been excluded as not being supported by admissible evidence.

Pursuant to Cal. Rules of Court, Rule 3.1312(a) and Code Civ. Proc. § 1019.5(a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: KAG on 10/22/18
(Judge's initials) (Date)

(28) **Tentative Ruling**

Re: ***Brown v. Bank of America, et al.***
Superior Court Case No. 16CECG02223

Hearing Date: October 24, 2018 (Dept. 503)

Motion: By Plaintiff to file a Second Amended Complaint

Ruling:

To grant the motion. Plaintiff shall have five (5) court dates to file the second amended complaint. Plaintiff is to perfect service in accordance with the applicable provisions of the Code of Civil Procedure.

Explanation:

Plaintiff moves for leave to file a second amended complaint. The apparent purpose of such an amendment is an attempt to avoid the impact of the court's order that Plaintiff's assignors be joined in the action. The court expresses no opinion on whether Plaintiff's proposed amendments would have such a legal impact on the case.

The court's discretion will usually be exercised liberally to permit amendment of the pleadings. (*Nestle v. Santa Monica* (1972) 6 Cal.3d 920, 939.) The court will not normally consider whether the cause of action is legally sufficient on a motion to amend, leaving that for challenge by a subsequent demurrer. (*Kittredge Sports Co. v. Superior Court* (1989) 213 Cal.App.3d 1045, 1048.)

In supporting a motion for leave to amend, a moving party must also attach a declaration specifying "(1) the effect of the amendment; (2) why the amendment is necessary and proper; (3) when the facts giving rise to the amended allegations were discovered; and (4) the reasons why the request for amendment was not made earlier." (Cal. Rule of Ct. 3.1324, subdivision (b).) Here, Plaintiff has submitted a declaration meeting the requirements of California Rule of Court 3.1324, subdivision (b).

Defendants oppose the motion on several grounds. First, Defendant DOCX argues that the motion should be denied and the entire matter abated pending resolution of the joinder issue, citing *Peerless Insurance Company, Inc. v. Superior Court* (1970) 6 Cal.App.3d 358. Although *Peerless Insurance* notes that a party can challenge the non-joinder of a necessary party through a plea in abatement, it nowhere holds that the filing of a motion to dismiss for lack of joinder pursuant to Code of Civil Procedure section 389 entitles a party to abatement of the action. (*Id.* at 360-64.) Further, no party has filed a motion or otherwise asked the court to abate the action or stay other proceedings pending a resolution of these matters.

Second, Defendant DOCX argues that the motion should be denied because Plaintiff's proposed amendments violate the "sham" pleading rule. The sham pleading doctrine gives a court discretion to deny leave where the proposed amendment omits

or contradicts harmful facts pleaded in the original pleading, absent a showing of mistake or other sufficient excuse for changing the facts. (*State of California ex rel. Metz v. CCC Information Services, Inc.* (2007) 149 Cal.App.4th 402, 412.)

The first category of items which Defendant DOCX claims is a "sham" is the omission of prior allegations that the transfers of deeds of trust are void. However, revising claims to avoid the legal effect of them is not what the sham pleading doctrine addresses. (*See, e.g., Contreras v. Blue Cross* (1988) 199 Cal.App.3d 945, 950 (amending employment claims to avoid ERISA pre-emption did not constitute sham pleading).) More specifically, cases interpreting the sham pleading doctrine examine the facts as amended by the plaintiff to determine if the plaintiff is attempting to avoid "bad" facts, and not the remedy sought. Here, Plaintiff is seeking to change the remedy. The sham pleading doctrine is simply inapplicable.

The second category Defendant DOCX challenges is a new allegation of fact that the assignors had the consequences of the assignment explained to them and were warned that they might become personally liable for the mortgage loans. (Proposed SAC ¶22.) However, such allegations do not contradict anything in the prior complaint. While, as noted by Defendants, the written assignments do not contain such warnings, allegations that the assignors were given such warnings do not contradict the written assignments. The court expresses no opinion as to the admissibility or legal effect of such warnings as alleged. In any event, the new allegations do not contradict anything in the previous pleading, and so the sham pleading doctrine is inapplicable here, as well.

Defendant DOCX also argues that allowing the amendment could result in the assignors losing substantive rights because of applicable statutes of limitations. However, Defendant has cited no authority that obligates an assignee to pursue all claims assigned to it. In fact, assignment of the claims extinguishes any right of the assignor to such claims. (*McCown v. Spencer* (1970) 8 Cal.App.3d 216, 225.) The reason the order to join the assignors has been granted in this case is because the claims, at least under the first amended complaint, have a serious potential impact on the assignors' substantive rights despite such an assignment. In any event, Defendant DOCX cited no legal authority for its argument.

Finally, Defendant DOCX argues that the amendments do not achieve what appears to be Plaintiff's aim, that of avoiding the need for joinder of the assignors. Whether or not the strategic aim is met (and, again, the court expresses no opinion on the subject), such is not a valid reason to deny the motion for leave to amend.

Additionally, Defendant DOCX argues that it will be prejudiced if amendment is allowed because Defendants could be exposed to significant risk of double, multiple, or otherwise inconsistent obligations. Again, this is an argument that relates to whether the amended complaint still meets the requirements for joinder, which is beyond the scope of the issues in this motion. Nothing in Defendant DOCX's opposition provides a basis for the court to exercise its discretion to deny the motion.

Defendant Bank of America has filed its own opposition and likewise argues that amending the complaint will not cause the joinder ruling to be revised. Again, such issues are not before the court on this motion.

For all these reasons, the motion for leave to file a second amended complaint is granted.

Pursuant to California Rules of Court, rule 3.1312, subdivision (a), and Code of Civil Procedure section 1019.5, subdivision (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: KAG on 10/22/18
(Judge's initials) (Date)

(17) **Tentative Ruling**

Re: ***Ocanas v. City of Parlier***
Superior Court Case No. 17CECG00180

Hearing Date: October 24, 2018 (Dept. 503)

Motion: City of Parlier's Demurrer to First Amended Complaint

Tentative Ruling:

To overrule the special demurrer. Defendant City of Parlier shall file its answer within 10 days of the clerk's service of this minute order.

Explanation:

According to its "demurrer," the City of Parlier demurs only specially on the ground that the cause of action for dangerous condition of public property is uncertain. (Code Civ. Proc., § 430.10, subd. (f).) The term "uncertain" includes the issue of whether the pleading is "ambiguous and unintelligible." (*Ibid*.) The City asserts the pleading is defective for failing to provide specificity as to the location of the hole and no detail as to the dimensions or size of the hole.

Under the Tort Claims Act, all liability is statutory. Hence, the rule that statutory causes of action must be specifically pleaded applies, and every element of the statutory basis for liability must be alleged. (*Lopez v. Southern Calif. Rapid Transit Dist*. (1985) 40 Cal.3d 780, 795.) A judicial complaint "alleging a dangerous condition may not rely on generalized allegations [citation] but must specify in what manner the condition constituted a dangerous condition." (*Brenner v. City of El Cajon* (2003) 113 Cal.App.4th 434, 439.) A judicial complaint's purpose is to limit the litigation's scope and provide the public entity with notice regarding the precise issues it must confront in the litigation. (*People ex rel. Dept. of Transportation v. Superior Court* (1992) 5 Cal.App.4th 1480, 1485–1486.)

However, a claim that a cause of action was not pleaded specifically, is generally raised on general demurrer for failure to state facts sufficient to constitute a cause of action, not special demurrer for uncertainty. (See *Tarmann v. State Farm Mut. Auto. Ins. Co.* (1991) 2 Cal.App.4th 153, 158 [affirming trial court's order sustaining general demurrer to fraud cause of action without leave to amend for lack of specificity]; *Wilhelm v. Pray, Price, Williams & Russell* (1986) 186 Cal.App.3d 1324, 1330–1332 [complaint that fails to plead fraud with sufficiently particularity is subject to general demurrer for failure to state a claim].)

Demurrers for uncertainty are disfavored. (*Khoury v. Maly's of California, Inc*. (1993) 14 Cal.App.4th 612, 616.) A demurrer for uncertainty may be sustained when the complaint is drafted in a manner that is so vague or uncertain that the defendant cannot reasonably respond, e.g., the defendant cannot determine what issues must be admitted or denied, or what causes of action are directed against the defendant. (*Ibid*.) Here, the City identifies no defense that it is precluded from raising due to

uncertainty. Demurrers for uncertainty are appropriately overruled where "ambiguities can reasonably be clarified under modern rules of discovery." (*Ibid*.) The exact location and nature of the hole can be clarified through discovery. The First Amended Complaint is not uncertain due to its failure to specify the location, depth and size of the hole.

The court grants judicial notice of the May 23, 2018 Order, and denies judicial notice of the transcript and map. However, the court will take judicial notice under Evidence Code section 452, subdivision (g) that the subject park is large. The court disregards the declaration of counsel offered in opposition as improper extrinsic evidence.

Pursuant to California Rules of Court, rule 3.1312(a) and Code of Civil Procedure section 1019.5, subdivision (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: KAG on 10/22/18
(Judge's initials) (Date)

(5)

Tentative Ruling

Re: ***People of the State of California, ex rel. City of Kingsburg v. Naomi Wright, Pamela Jackson, Joseph Cauwels and Angela Cauwels***
Superior Court Case No. 17CECG01742

Hearing Date: October 24, 2018 (Dept. 503)

Motion: By Plaintiff for a preliminary injunction

Tentative Ruling:

To grant, in part. Plaintiff is to prepare an order enjoining Defendants from residing in, or occupying, either on a permanent or temporary basis, the Premises or Residence, until further notice. The order is to be submitted within five (5) court days of notice of the ruling, plus five (5) days for service via mail. (CCP § 1013.)

Explanation:

Under the State Housing Law (Health & Safety Code §§17910-17998.3), an enforcement agency (see Health & Safety Code §§17960-17967) may declare a building to be "substandard" (Health & Safety Code §17920.3). If the conditions have not been corrected within 30 days (or shorter period if necessary to remedy an immediate threat to the health and safety of the public or occupants), the enforcement agency may file a civil action against the owner or other responsible party. (Health & Safety Code §§17980-17982.)

In these actions, the enforcement agency may ask the court to enjoin the violation, to grant a preliminary injunction, and to issue an order permitting the locality to abate any public nuisance, including appointment of a receiver. (Health & Safety Code §§17980-17982.) Additional remedies are allowed if the building's violations are so extensive and of such a nature that the health and safety of the residents or the public is "substantially endangered." (Health & Safety Code §§17980.6-17980.7.)

If the substandard building is in such a state of disrepair that the health and safety of the residents or the public is "substantially endangered," the court may order the violator to pay penalties in the event of repeat violations and may order the violator to not claim any deduction on state taxes for interest, taxes, expenses, depreciation, or amortization on the property for a period of up to two years. (Health & Safety Code §§17980.6-17980.7(b); see also Rev. & Tax Code §§17274, 24436.5 (administrative process for local agencies to prevent owners from claiming state tax deductions for "substandard housing").)

If the owner does not correct the condition that caused the violation, a court may order the appointment of a receiver on application of the municipality. (Health & Safety Code §17980.7(c).) The receiver then assumes responsibility for making the repairs and relocating tenants if necessary. (Health & Safety Code §17980.7(c).) The

court has wide discretion in approving the receiver's proposed actions, including demolition of the property, especially when the property poses a substantial health and safety risk. (*City of Santa Monica v Gonzalez* (2008) 43 Cal.4th 905, 931.)

Merits

In the case at bench, no formal order was submitted. According to Plaintiff's Memorandum of Points and Authorities, at page 27, lines 8-22:

> [T]he City requests issuance of a preliminary injunction, immediately authorizing the City to enter the above-described Property and Residence, for the purpose of abating the public nuisance conditions of the Premises and Residence. The City further requests a Court order allowing the City to lien the abatement costs and reasonable administrative expenses incurred by the City against Premises and Residence. The City also requests a preliminary injunction prohibiting Defendants from causing or allowing, by action or neglect, either directly or indirectly, the condition of the Premises and/or Residence to constitute a public nuisance as defined in CC §§ 3479, 3480 and KMC § 17.92.040. Finally, the City requests a preliminary injunction prohibiting Defendants from residing in, or occupying, either on a permanent or temporary basis, the Premises or Residence, until the Residence has been inspected and approved safe for occupancy by the City.

But, Plaintiff relies heavily upon the general application of Code of Civil Procedure section 526 and also cites extensively to the Kingsburg Municipal Code in support of the motion. Neither the statute nor the Municipal Code permit such a broad order via a preliminary injunction.

In similar circumstances, a receiver is usually appointed to abate a substandard residence. Either the enforcement agency, a tenant, or a tenant association may petition the court for *appointment of a receiver* to assume control of the substandard property and take the necessary steps to correct the cited violations. (Health & Safety Code § 17980.7(c); see *City of Chula Vista v. Gutierrez* (2012) 207 Cal.App.4th 681, 687; *Erlach v. Sierra Asset Servicing, LLC* (2014) 226 Cal.App.4th 1281, 1293-1294, fn. 7.)

In this case, Plaintiff has not met its burden of proof regarding the issuance of such a broad order. Therefore, the Court will only issue an injunction prohibiting Defendants from residing in, or occupying, either on a permanent or temporary basis, the Premises or Residence, until the further notice.

Pursuant to California Rules of Court, Rule 3.1312, subd. (a) and Code of Civil Procedure section 1019.5, subd. (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: KAG on 10/22/18
(Judge's initials) (Date)

(24) **Tentative Ruling**

Re: ***Fresno Watchdogs for Ethical Bidding v. Brooke Ashjian***
Superior Court Case No. 17CECG02900

Hearing Date: October 24, 2018 (Dept. 503)

Motion: Defendant Brook Ashjian's Motion to Compel Identification of Persons Most Qualified and to Compel Their Attendance at Deposition

Tentative Ruling:

To deny without prejudice. Defendant's time to file a motion to compel further responses (i.e., to refile the motion) is deemed tolled for ten days, pursuant to Superior Court of Fresno County, Local Rules, rule 2.1.17.

Explanation:

Defendant's motion is defective in a number of respects. First, the notice of motion does not clearly state which interrogatories are the subject of the motion and the statutory grounds for the motion. (Code Civ. Proc. § 1010; Cal. Rules of Court, rule 3.1110, subd. (a).) Instead, the first paragraph simply refers to the entire copy of the special interrogatories, consisting of 53 questions, attached to Mr. Slater's declaration, when only nine of these interrogatories are at issue.

Second, and more importantly, defendant did not file a separate statement with the motion, which is required on a motion to compel further responses. (Cal. Rules of Court, rule 3.1345, subd. (b)-(c).) Failure to comply with this rule is grounds for denial of the motion. (*Mills v. US. Bank* (2008) 166 Cal.App.4th 871, 893.) Defense counsel compounded this problem by filing a 25-page opening brief, without obtaining prior leave of court as required by California Rules of Court, rule 3.1113, subdivision (e), and justified the action in the reply brief by arguing that, while the opening brief was "admittedly lengthy," he felt this "approach" would "work better." (Reply, p. 2:2-5.) Counsel then filed a belated separate statement with the reply brief, apparently as if that somehow addressed the problem, and indicated that, if plaintiff wished to, it had "plenty of time" to respond to the separate statement "should it choose to do so." (*Id.*, p. 2:5-8.) Alternatively, counsel generously stipulated to continue the hearing date. (*Id.*, p. 2:8-9.)

Defense counsel has created his own purported rules, rather than following the rules promulgated by the Judicial Council. The court also notes that the separate statement that was filed is not in the correct format. While the information contained in the "interrogatory," "objection," and "argument" columns appears to be appropriate under these categories—i.e., it is what is required by rule 3.1345, subdivision (c)(1)-(3)—the information should be laid out in separate *rows* rather than separate *columns,* and without a column for "sustaining/overruling." This will allow plaintiff to respond in its own separate statement by adding its argument below defendant's argument. There are

many practice guides that provide good examples of how to properly format a separate statement.

Rather than simply deny the motion outright, the court will deny it without prejudice to defendant filing a corrected motion, and will extend the tolling provided by Local Rule 2.1.17 by a short amount of time.

Pursuant to California Rules of Court, rule 3.1312 and Code of Civil Procedure section 1019.5(a), no further written order is necessary. The minute order adopting this ruling will serve as the order of the court, and service by the clerk of the minute order will constitute notice of the order.

Tentative Ruling
Issued By: KAG on 10/22/18
(Judge's initials) (Date)